

Ms. Maris

16083

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of Air Force Contract Award]

FILE: B-200260; B-200260.2 DATE: February 9, 1981

MATTER OF: Mil-Tec Systems Corp.;
ACR Electronics, Inc.

DIGEST:

Where agency does not notify competing offerors of intention to make award under 100 percent small business set-aside, award is subject to timely small business size status appeal and where Small Business Administration finds awardee is not small business, termination of contract is appropriate.

Mil-Tec Systems Corporation and ACR Electronics, Inc. protest the award of a contract to Quadratic Electronics, Inc., under request for proposals (RFP) No. F41608-80-R-2113 issued by Kelly Air Force Base for battery operated radio beacons. The solicitation was a 100 percent small business set-aside.

ACR's protest is based on the Air Force's alleged failure to provide the pre-award notice required by Defense Acquisition Regulation (DAR) § 1-703(b)(1), the purpose of which is to allow unsuccessful offerors the opportunity to protest the small business size status of the apparent successful offeror.

The Air Force contends that on July 21, 1980, a message was prepared and forwarded to the Communications Center at Kelly Air Force Base for transmittal to both ACR and Mil-Tec, advising that Quadratic was the apparent low offeror and providing an opportunity to challenge Quadratic's small business size status. ACR claims that neither it nor Mil-Tec ever received this message.

After learning on August 26, 1980, that award had been made to Quadratic, ACR dispatched a wire to the

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contracting activity protesting Quadratic's status as a small business. By letter of August 29, 1980, the Air Force advised ACR that its size status protest was untimely since it had not been filed by the deadline of July 28, 1980, set by the July 21 pre-award notice. ACR was advised that its protest was being forwarded to the Small Business Administration (SBA) for consideration in future actions in accordance with DAR § 1-703(b)(1)c.

The Air Force also advises that although the contracting activity followed the proper method of preparation and distribution of the message, it cannot confirm that the message was actually sent since the Communications Center only retains copies of messages dispatched for 30 days. While the contracting activity has a file copy of the message forwarded to the Communications Center for transmission, this provides no evidence that transmission to ACR actually ever occurred.

More importantly, ACR has provided a copy of a letter it received from the Chief, Communications-Electronics Operations Division at MacDill Air Force Base, which reads in pertinent part as follows:

"[A] check of our transmit records reveals no message was sent from this facility to your company on 21 July 1980 nor the following day."

MacDill is the interim transmission point for messages from Kelly. Under these circumstances, we conclude that the pre-award notice required by DAR § 1-703(b)(1) was never provided to ACR.

On September 16, 1980, the SBA Atlanta Regional Office issued its "Findings and Decision" in the matter and found both that Quadratic did not qualify as a small business for the procurement and that ACR's size status protest had been filed in a timely manner. The latter conclusion was reached because the Air Force could not produce records to confirm that the pre-award notice message had actually been dispatched. The SBA found that under such circumstances, the benefit of doubt should be afforded the small business. On September 29, 1980, the Air Force filed an appeal of the SBA's decision on the timeliness issue. Quadratic also filed an appeal with respect to the size status determination. On January 7, 1981 the SBA Size Appeals Board affirmed the decision of the Atlanta Regional Office.

A negotiated award made without prior notice to competing offerors must be subject to a timely size status protest if the small business size status protest procedures are not to be circumvented. R.E. Brown Co., Inc., B-193672, August 29, 1979, 79-2 CPD 164. Here, in response to a protest promptly filed after notice of award was received, SBA has ruled that Quadratic is not a small business. Under these circumstances, we believe termination of the contract is appropriate and are so recommending. A&R Window Cleaning & Janitorial Service, Inc., B-197612, March 28, 1980, 80-1 CPD 231; PSI-Peripheral Support Division of the Meson Corporation, B-180675, August 6, 1974, 74-2 CPD 81.

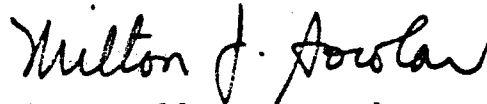
We note that the Air Force has cited our decision in Techalloy Company, Inc., B-187856, March 15, 1977, 77-1 CPD 192, in support of its argument that the contract should not be terminated absent a clear showing of intentional misrepresentation by Quadratic in certifying itself as a small business. In Techalloy the contract was properly awarded after bidders had the opportunity to file a size status protest and the SBA Regional Office ruled against the protesting party. In this case, ACR was not given the opportunity to protest prior to award. Consequently, we believe that to protect the integrity of the self-certification procedure and to insure awards of set-aside procurements to bona fide small business concerns, a finding by the SBA under these circumstances that the awardee is not small should result in termination of the contract without regard to whether the bidder intentionally misrepresented its status.

The protest is sustained.

In view of the foregoing, the protest of Mil-Tec Systems over the award to Quadratic is moot and need not be considered further.

Since this decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 21 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency

to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and House and Senate Committee on Appropriations concerning the action taken with respect to our recommendation.

A handwritten signature in dark ink, reading "Milton J. Fowler". The signature is written in a cursive style with a large, stylized "M" and "F".

For The Comptroller General
of the United States